Supreme Court, U.S.
FILED
NOV 30 2015
OFFICE OF THE CLERK

No. 15-674

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA, ET AL.,
Petitioners,

v.

STATE OF TEXAS, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF BIPARTISAN FORMER MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

ELIZABETH B. WYDRA*
BRIANNE J. GOROD
SIMON LAZARUS
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1200 18th Street NW
Suite 501
Washington, D.C. 20036
(202) 296-6889
elizabeth@theusconstitution.org

Counsel for Amici Curiae

November 30, 2015

* Counsel of Record

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
THE COURT SHOULD GRANT REVIEW TO CLARIFY THAT THE DHS DIRECTIVES ARE A LAWFUL EXERCISE OF EXECUTIVE DISCRETION	4
A. On a Bipartisan Basis, Congress Has Long Recognized that the Nation's Immigration Laws Confer Significant Discretion on the Executive Branch.	5
B. The DHS Directives Apply Established and Lawful Priorities and Methods Utilized by Presidents of Both Parties and Sanctioned Repeatedly by Congresses on a Bipartisan Basis	7
CONCLUSION	11
APPENDIX:	1a

TABLE OF AUTHORITIES

Page(s)

Cases

Arizona v. United States,
132 S. Ct. 2492 (2012) 7

Harisiades v. Shaughnessy,
342 U.S. 580 (1952) 5

Heckler v. Chaney,
470 U.S. 821 (1985) 5

Jama v. Immigration & Customs Enforcement,
543 U.S. 335 (2005) 7

Medellin v. Texas,
554 U.S. 759 (2008) 5

Reno v. American-Arab Anti-Discrimination Comm.,
525 U.S. 471 (1999) 8

United States ex rel. Knauff v. Shaughnessy,
338 U.S. 537 (1950) 5

Constitutional Provisions and Legislative Materials

8 U.S.C. § 1103(a)(3) 6

8 U.S.C. § 1154(a)(1)(D)(i) 8

8 U.S.C. § 1227(d)(2) 8

Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002) (codified at 6 U.S.C. § 202(5)) 6

TABLE OF AUTHORITIES – cont'd.

Page(s)

National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, 117 Stat. 1392 (2003) (codified at 8 U.S.C. § 1151 note) 8

Books, Articles, and Other Authorities

Actions Overview: H.R. 7311—110th Congress (2007-2008), Congress.gov, https://www.congress.gov/bill/110th-congress/house-bill/7311/actions?q=%7B%22search%22%3A%5B%22%5C%22hr7311%5C%22%22%5D%7D&resultIndex=1 (last visited Nov. 23, 2015) 9

Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 Yale L.J. 458 (2009) 6

Memorandum from Jeh Charles Johnson, Sec'y, U.S Dep't of Homeland Sec., for León Rodríguez, Dir., U.S. Citizenship & Immigration Servs., et al., Re: Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents (Nov. 20, 2014), http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf 3

TABLE OF AUTHORITIES – cont'd.

Page(s)

Memorandum from Jeh Charles Johnson, Sec'y, U.S. Dep't of Homeland Sec., for Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enforcement, et al., Re: Policies for the Apprehension, Detention and Removal of Undocumented Immigrants (Nov. 20, 2014), http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf 3

Memorandum Opinion from Karl R. Thompson, Principal Deputy Assistant Attorney Gen., Office of Legal Counsel, for the Sec'y of Homeland Sec. and the Counsel to the President, The Department of Homeland Security's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others 18 (Nov. 19, 2014), http://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/20/2014-11-19-auth-prioritize-removal.pdf 8, 9

INTEREST OF *AMICI CURIAE*[1]

Amici are a bipartisan group of former members of Congress who served when key components of the nation's immigration laws, including provisions pertinent to this case, were drafted, debated, and passed. Based on their experience serving in Congress, *amici* know that the nation's immigration laws, including the Immigration and Nationality Act ("INA"), delegate significant discretion to the executive branch to interpret and administer the law, including setting enforcement priorities and providing guidance to field officials to facilitate the implementation of those priorities. *Amici* understand that Congress has conferred this discretion on the executive branch because immigration is a field in which flexibility and adaptation of congressional policy is essential.

Amici know that the directives at issue in this litigation implement enforcement priorities that have been embraced by previous Administrations and specifically endorsed by the immigration laws passed by Congress. They also know that the directives at issue in this litigation employ an administrative mechanism—case-by-case exercise of discretion to defer removal—that has been long employed by Administrations of both parties and repeatedly endorsed by Congress. *Amici* believe that the position adopted by the

---

[1] Counsel for all parties received notice at least 10 days prior to the due date of *amici*'s intention to file this brief; all parties have consented to the filing of this brief. Under Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

court below is not only at odds with well-established precedent, but would also dramatically undermine the executive branch's ability to effectively enforce the nation's immigration laws in the manner that multiple congresses and Administrations, representing both political parties, have established.

Amici have an interest in ensuring that courts respect the executive branch's authority to exercise this discretion pursuant to its statutory authority because the sound exercise of that discretion is often critical to carrying out the policies that Congress has written into the immigration laws. While *amici* are aware that people may disagree about the wisdom of the policy choices the executive branch has made here, *amici* have no doubt that those policy choices are well within the range of legal options allowed the executive branch by the nation's immigration laws. By concluding otherwise, the court below did damage to the statutory scheme put in place by Congress, which depends upon the executive branch to make the sorts of discretionary choices at issue here.

A full listing of *amici* appears in the Appendix.

SUMMARY OF ARGUMENT

The Petition for a Writ of Certiorari in this case presents an important question: whether, consistent with the authority Congress has conferred on the Department of Homeland Security ("DHS") to exercise discretion to effectively enforce the nation's immigration laws, the Secretary of DHS acted lawfully in establishing a process that would allow federal officials to consider, on a case-by-case basis, whether to defer removal of certain individuals who have lived in the United States for five years and either came here as children or have children who are U.S. citizens or lawful permanent residents.

On November 20, 2014, the Secretary of DHS issued a series of directives to establish priorities for DHS officials' exercise of their discretion when enforcing federal immigration law. These directives clarified that the federal government's enforcement priorities "have been, and will continue to be national security, border security, and public safety,"[2] and they further directed that in light of those priorities, and given limited enforcement resources, federal officials should exercise their discretion, on a case-by-case basis, to defer removal of certain parents of U.S. citizens or lawful permanent residents.[3]

According to the court below, these directives likely violate both the procedural and substantive components of the Administrative Procedure Act ("APA"). *See* Pet. App. 3a. As the Petition demonstrates, this conclusion is at odds with both the APA and the nation's immigration laws, and would dramatically impair the ability of the executive branch to enforce those laws in accord with Congress's intent and direction. Pet. 18-35. This brief in support of the Petition explains in greater detail just how significantly the decision below misunderstands the laws at

---

[2] Memorandum from Jeh Charles Johnson, Sec'y, U.S. Dep't of Homeland Sec., for Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enforcement, et al., Re: Policies for the Apprehension, Detention and Removal of Undocumented Immigrants 2 (Nov. 20, 2014), http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf.

[3] Memorandum from Jeh Charles Johnson, Sec'y, U.S Dep't of Homeland Sec., for León Rodríguez, Dir., U.S. Citizenship & Immigration Servs., et al., Re: Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents (Nov. 20, 2014), http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf [hereinafter DAPA Memo.].

issue here and the scope of discretion they confer on the executive branch to determine how best to implement them.

Having served in Congress when it enacted major components of the nation's immigration laws, *amici* know that the directives at issue in this litigation reflect priorities that were developed by Administrations representing both political parties and have been consistently endorsed by Congresses on a bipartisan basis. Likewise, these directives implement these policies through a long-established, well-defined, and circumscribed means of enforcement prioritization—deferred action on removal—that has been consistently employed by Administrations of both parties and repeatedly endorsed by Congress.

ARGUMENT

THE COURT SHOULD GRANT REVIEW TO CLARIFY THAT THE DHS DIRECTIVES ARE A LAWFUL EXERCISE OF EXECUTIVE DISCRETION

Based on their experience serving in Congress, *amici* are familiar with the nation's immigration laws and, just as important, the significant role that executive branch discretion has long played in implementing those laws. They thus know that these laws vest considerable discretion in the executive branch to determine the nation's priorities in immigration enforcement and to determine how those priorities should be reflected in on-the-ground enforcement of those laws. They also know that the DHS directives at issue in this case are no different as a legal matter than the innumerable other exercises of executive discretion engaged in by presidents of both parties and blessed by both parties in Congress.

A. On a Bipartisan Basis, Congress Has Long Recognized that the Nation's Immigration Laws Confer Significant Discretion on the Executive Branch.

As *amici* well know from their time serving in Congress, it is impossible for Congress to anticipate in advance every situation to which legislation must apply. That is particularly true in a context, like immigration, that touches on the nation's foreign affairs and must adapt to frequently changing conditions on the ground. As the Supreme Court has noted, immigration law is a field in which "flexibility and the adaptation of the congressional policy to infinitely variable conditions constitute the essence of the program." *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950) (quoting *Lichter v. United States*, 334 U.S. 742, 785 (1948)); *see also Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952) (immigration is a field that is "vitally and intricately interwoven with . . . the conduct of foreign relations"); *cf. Medellin v. Texas*, 554 U.S. 759, 765 (2008) (noting the "President's responsibility for foreign affairs").

Reflecting these considerations, Congress has recognized that the executive branch must have discretion to determine how best to enforce the nation's immigration laws by "balancing . . . factors which are peculiarly within its expertise," *Heckler v. Chaney*, 470 U.S. 821, 831 (1985), including foreign relations, humanitarian considerations, and national security concerns. Accordingly, Congress has repeatedly conferred authority on executive branch officials to exercise discretion in enforcing the nation's immigration laws. For example, in the INA, Congress authorized the Secretary of Homeland Security to "establish such regulations; . . . issue such instructions; and perform such other acts as he deems necessary for carrying

out his authority" under the statute. 8 U.S.C. § 1103(a)(3). And in the Homeland Security Act of 2002, Congress directed the Secretary to establish "national immigration enforcement policies and priorities." Pub. L. No. 107-296, § 402(5), 116 Stat. 2135, 2178 (2002) (codified at 6 U.S.C. § 202(5)).[4] The consequence of these and other delegations in the immigration laws enacted by Congress is to "delegat[e] tremendous authority to the President to set immigration screening policy." Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 Yale L.J. 458, 463 (2009).

Significantly, this delegation of discretion is essential in the immigration context because Congress has made a substantial number of noncitizens deportable, but has nowhere mandated that every single undocumented immigrant be removed (or, perhaps more important, appropriated the funds that would be necessary to effectuate such a mass removal). *Id.* (noting that the legislative branch has made a "huge fraction of noncitizens deportable at the option of the Executive"). As a result, the executive branch necessarily must exercise discretion in determining who should be removed consistent with the nation's "immigration enforcement policies and priorities." Pub. L. No. 107-296, § 402(5), 116 Stat. at 2178.

This Court has repeatedly recognized the broad discretion that Congress has conferred on the executive branch in the immigration context. As recently

---

[4] The court below points to a number of provisions of the INA which, it claims, prohibit the exercise of executive discretion at issue here. *See* Pet. App. 71a-76a. But, as the petition demonstrates, *see* Pet. 27-28, those provisions say nothing about the executive branch's ability to engage in the sort of limited exercise of discretion at issue here.

as 2012, the Court noted that "[a] principal feature of the removal system is the broad discretion exercised by immigration officials," *Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012), and that "[f]ederal officials, as an initial matter, must decide whether it makes sense to pursue removal at all," *id.* As the Court explained, the discretion enjoyed by the executive branch allows its officers to consider many factors in deciding when removal is appropriate, including both "immediate human concerns" and "foreign policy." *Id.*; *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 348 (2005) ("Removal decisions . . . 'may implicate our relations with foreign powers' and require consideration of 'changing political and economic circumstances.'" (quoting *Mathews v. Diaz*, 426 U.S. 67, 81 (1976))).

In short, executive discretion to determine how best to implement the laws passed by Congress is intentionally imbedded in the INA and the nation's other immigration laws.

B. The DHS Directives Apply Established and Lawful Priorities and Methods Utilized by Presidents of Both Parties and Sanctioned Repeatedly by Congresses on a Bipartisan Basis.

Based on their experience in Congress, *amici* are familiar not only with the discretion that members of Congress of both parties have embedded in the nation's immigration laws, but also with the manner in which presidents of both parties have exercised that discretion. It is particularly relevant here that the practice of deferring removal of certain individuals, when doing so facilitates the nation's immigration enforcement priorities, is a long-standing manifestation of the executive branch's responsibility to exercise sound discretion in enforcing the nation's immigra-

tion laws. Significantly, it is also a practice that has been deployed by presidents of both parties. *See, e.g.*, *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483-84 (1999) [hereinafter *AADC*] (the executive branch has long "engag[ed] in a regular practice (which ha[s] come to be known as 'deferred action') of exercising [its] discretion for humanitarian reasons or simply for its own convenience").

Moreover, members of Congress of both parties have long "been aware of the practice of granting deferred action, including in its categorical variety . . . and [Congress] has never acted to disapprove or limit the practice."[5] To the contrary, Congress has repeatedly acknowledged the existence of such programs. *See, e.g.*, INA, 8 U.S.C. § 1154(a)(1)(D)(i)(II), (IV) (noting that Violence Against Women Act self-petitioners may be "eligible for deferred action"); *id.* § 1227(d)(2) (noting that denial of a stay request does not "preclude the alien from applying for . . . deferred action"); National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, § 1703(c), (d), 117 Stat. 1392, 1694-95 (2003) (codified at 8 U.S.C. § 1151 note) (identifying individuals who are "eligible for deferred action"); *see also AADC*, 525 U.S. at 485 (concluding that Congress enacted 8 U.S.C. § 1252(g) "to give some measure of protection to 'no deferred action' decisions and similar discretionary determina-

---

[5] Memorandum Opinion from Karl R. Thompson, Principal Deputy Assistant Attorney Gen., Office of Legal Counsel, for the Sec'y of Homeland Sec. and the Counsel to the President, The Department of Homeland Security's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others 18 (Nov. 19, 2014), http://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/20/2014-11-19-auth-prioritize-removal.pdf [hereinafter Office of Legal Counsel Op.].

tions"). Indeed, *amicus* Congressman Berman sponsored a piece of legislation that explicitly referenced a deferred action program for certain bona fide visa applicants and directed DHS to compile a report on how quickly a particular service center processed deferred action applications. Office of Legal Counsel Op., *supra* note 5, at 19. That bill was passed by both houses of Congress without objection.[6] As *amici* are well aware, these statutory and other authoritative expressions of congressional support for deferred removal programs reflect Congress's repeated determinations that such programs can aid the executive branch in exercising its discretion to determine how best to enforce the nation's immigration laws.[7]

---

[6] *See Actions Overview: H.R. 7311—110th Congress (2007-2008)*, Congress.gov, https://www.congress.gov/bill/110th-congress/house-bill/7311/actions?q=%7B%22search%22%3A%5B%22%5C%22hr7311%5C%22%22%5D%7D&resultIndex=1 (last visited Nov. 23, 2015).

[7] According to the court below, this "[h]istorical practice" is too "far afield from the challenged program" to "shed[] light on the Secretary's authority to implement DAPA" because those earlier programs were "interstitial," whereas this one is not. Pet. App. 84a. This is wrong. These directives, like earlier deferred action programs, establish guidelines for the exercise of case-by-case discretion that are consistent with established national priorities for immigration enforcement and are consistent with the authority Congress has conferred on the executive branch. Thus, while the population of immigrants covered by the nation's immigration laws has increased over time, the nature of the DAPA program is not novel. Moreover, the Family Fairness program the court below mentions (*id.* at 83a) "made a comparable fraction [approximately 1.5 million of the contemporary cohort of approximately 3.5 million] of undocumented aliens . . . potentially eligible for discretionary extended voluntary departure relief." Office of Legal Counsel Op., *supra* note 5, at 31.

Finally, these multiple, bipartisan congressional actions make clear that these directives violate neither the procedural nor the substantive requirements of the APA, as the Petition well demonstrates, *see* Pet. 24-31; *see also id.* at 26. Indeed, while Respondents may disagree with the manner in which the executive branch has exercised its discretion here, that sort of disagreement is a policy difference, not a legal one, and it is one that should be resolved through political processes, not the courts. Were the courts available to consider any such policy dispute about how the president has exercised his lawfully-given discretion, it would dramatically undermine the President's ability to enforce the laws Congress has enacted. By concluding otherwise, the court below did great damage to the statutory scheme put in place by Congress, a statutory scheme that depends upon the executive branch to make the sorts of discretionary choices at issue here to ensure that immigration enforcement best serves the national interest in public safety and national security.

CONCLUSION

For the foregoing reasons, *amici* urge the Court to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

ELIZABETH B. WYDRA*
BRIANNE J. GOROD
SIMON LAZARUS
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1200 18th Street NW
Suite 501
Washington, D.C. 20036
(202) 296-6889
elizabeth@theusconstitution.org

Counsel for Amici Curiae

November 30, 2015

* Counsel of Record

APPENDIX

APPENDIX:

LIST OF *AMICI*

Barnes, Michael
Former Representative of Maryland (1979-1987); Chair of the Western Hemisphere Subcommittee of the House Committee on Foreign Affairs

Berman, Howard
Former Representative of California (2003-2013); Chair of the House Committee on Foreign Affairs; Member of the Committee on the Judiciary

Fazio, Victor H.
Former Representative of California (1979-1993); Chair of the House Democratic Caucus

Gonzalez, Charles
Former Representative of Texas (1999-2013); Chair of the Hispanic Caucus

LaHood, Raymond H. ("Ray")
Former Representative of Illinois (1995-2009); Member of the House Permanent Select Intelligence Committee, and the Republican Mainstream Partnership: Former United States Secretary of Transportation (2009-13)

Leach, James A.
Former Representative of Iowa (1977-2007); Chair of the House Committee on Financial Services; Member of the Committee on International Relations; Chair of the Subcommittee on Asian-Pacific Affairs; Chair of the National Endowment of the Humanities (2009-13)

Lugar, Richard
Former Senator of Indiana (1977-2013); Chair of the Senate Committee on Foreign Relations; Chair of the Committee on Agriculture, Nutrition, and Forestry

Miller, George
Former Representative of California (1975-2015); Chair of the House Committee on Education and Labor

Porter, John E.
Former Representative of Illinois (1980-2001); Member of the House Committee on Appropriations; Chair of the Subcommittee on Labor, Health & Human Services, and Education; Vice-Chair of the Subcommittee on Foreign Operations; Vice-Chair of the Subcommittee on Military Construction; Founder and Co-Chair of the Congressional Human Rights Caucus

Skaggs, David

Former Representative of Colorado (1987-1999); Member of the House Permanent Select Committee on Intelligence; Chair of the Democratic Study Group

Waxman, Henry A.

Former Representative of California (1975-2015); Chair of the House Committees on Oversight and Government Reform, and Energy and Commerce